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No. 82-1086

In The

Supreme Court of the United States

October Term, 1982

DAVID H. GROOM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Was the evidence presented at trial sufficient as a matter of law to support the jury's verdict of guilty in a situation where the critical issue of the petitioner's criminal intent was conceded by the Government's expert witness to be a matter where reasonable tax experts could agree that petitioner's theory of tax deferral was both legal and proper?

2. Is a new trial warranted where there is substantial and credible evidence that the petitioner was prevented from testifying in his own behalf, because his trial counsel stated to him that he would seek to withdraw his representation of him if he took the stand over trial counsel's objection?

3. Is a new trial mandated by a denial of effective assistance of counsel in a situation where no defense testimony or evidence is offered at trial, despite the fact that (1) the petitioner insisted on testifying; (2) an expert accounting witness was interviewed and available to endorse the propriety of petitioner's tax deferral plan, and (3) numerous character witnesses could have been secured if trial counsel had chosen to utilize them?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David H. Groom, the petitioner herein, prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 16, 1982 and November 8, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not yet published. A copy of the court's judgment-order is attached as Appendix A. By order dated November 8,

1982, the United States Court of Appeals for the Third Circuit denied a petition for panel rehearing (Appendix B). The opinion of the United States District Court for the Western District of Pennsylvania has been neither published nor filed. On November 18, 1982, the United States Court of Appeals for the Third Circuit stayed its mandate until December 15, 1982, pending filing of this petition (Appendix C). A petition for a further stay of the mandate to December 24, 1982 was filed with the United States Court of Appeals for the Third Circuit on December 16, 1982 (Appendix D).

JURISDICTION

The judgment-order of the United States Court of Appeals for the Third Circuit was entered on September 16, 1982 (Appendix A). A timely petition for rehearing was denied on November 8, 1982 (Appendix B). The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Title 26, United States Code, §7206(2) (1970 ed.):

> "Any person who— . . .
>
> (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim,

or document. . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

2. United States Constitution, Amendment Six:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. United States Constitution, Amendment Five:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner, David H. Groom, was charged in a sixteen-count indictment with advising the preparation of false and fraudulent tax returns in violation of 26 U.S.C. §7206(2) (1970 ed.). Petitioner asserted his innocence, and after an eight-day jury trial in the United States District Court for the Western District of Pennsylvania, he was adjudged guilty of all sixteen counts in a verdict that was rendered on October 2, 1981. Execution of a two-year prison sentence and a $16,000 fine has been stayed pending appeal.

Petitioner was a certified public accountant and a professor of accounting during the period in question, taxable years 1974 to 1977, inclusive. Mr. Groom had a great deal of experience with the coal industry, and had served as an accountant for several of the coal companies in the area, including a firm owned and operated by Kenneth C. and John T. Harmon.

John Harmon contacted petitioner in early 1974, and consulted with him as to the possibility of devising a tax plan whereby his coal company could secure some federal tax relief from what was anticipated in early 1974 as a period when the coal producers would enjoy short-lived, but inordinately high incomes. Petitioner set out to come up with such a plan. He contacted a highly respected accounting firm in Pittsburgh, discussed the issues with a tax lawyer from Philadelphia, and personally conducted almost three weeks of "non-stop" research on the problem.

The result of his efforts was a plan whereby a coal company would defer reporting receipts as income by diverting those receipts to a coal brokerage firm. The firm would redistribute the receipts to the coal companies, at which time the redistributed receipts would be reported as income for the taxable year in which they

were received from the brokerage firm. The coal brokerage firm was an independent business entity that was actively involved in investing the funds that it received. Neither the coal companies nor its managerial personnel had any role in the operation or management of the coal brokerage firm.

The coal brokerage frim which was to serve as the necessary conduit was formed in 1974 by the petitioner, and was named "B & G Coal Company". Mr. Groom was the sole director and manager of the company, as those who used the company for tax deferral purposes had no imput into its operation. Petitioner contracted with the Harmon Mining (Coal) Company, John T. and Deloras C. Harmon, Kenneth C. and Shirley M. Harmon, and Thomas F. and Shirley Huff to utilize his firm as a "tax shelter" for tax years 1974 to 1977. His advice and activities, relative to these individuals' use of his "tax shelter" and the subsequent income tax returns they filed, represented the substance of the Government's criminal charges against him.

There has never been any contention by petitioner that he did not form the coal brokerage firm, or that he did not advise his clients to use the firm to defer some portion of their federal tax liability. As a matter of fact, the essence of petitioner's defense at trial was that he did everything that the Government alleged that he did, with the critical exception of acting with the knowledge that the tax return information was false and his advice was fraudulent. Thus, the operative issue in this case is whether petitioner's use of his "tax shelter" was employed with the intent to defraud the Government because of his awareness that his tax deferral plan was illegal, or whether he acted on the basis of a sincere belief that he had devised a novel, but lawful, plan which would afford some tax relief for his beleaguered coal producing clients.

The record makes it clear that everything that was done by petitioner in connection with his coal brokerage firm was done openly and publicly, and with the full knowledge and consent of his tax clients. As a result, the Government's argument as to his intent and the state of mind that accompanied it is premised on the supposed clarity of the federal tax law as it relates to the subject of "constructive receipts". That premise, however, was contradicted at trial by the Government's own expert witness, Special Agent Gloekler, who testified as follows:

> "[MR. RUTTER:]
>
> Q. Agent Gloekler, perhaps we can simplify this portion of your examination by asking you this question and getting your answer: You have expressed an opinion concerning the reportability of Harmon of the checks to B & G. Would you concede for me, sir, that there are those who might have a difference of opinion on that subject with you? A. Based on the testimony that I heard, sir, that was my opinion based on the testimony and the records that have been admitted into evidence.
>
> Q. I understand that is your opinion. All I am asking you: Would you agree with me that there are those who might hold a different opinion? A. Possibly, yes, sir.
>
> Q. That is say, this is a matter of difference of opinion between people of equal expertise? A. Might well be, yes, sir. . . . [District Ct. Tr. Transcript, pp. 31a-33a].

* * *

Q. Okay. All I am saying to you, Agent Gloekler: The opinions you expressed about when you report a check and what are receipts to whom, they are things that you have an opinion about, yes? A. Yes, sir.

Q. But people with equal competence and equal training could have a difference of opinion, couldn't they, sir? A. Yes.

Q. Neither one of you is wrong in a way that make you go to jail, are you? A. No, sir.

Q. Suppose you were wrong on the question, would you think you should go to jail for being wrong in your opinion? A. No, sir. . . ." (District Ct. Tr. Transcript, p. 33a).

Under all of the above circumstances, the petitioner's testimony as to the nature of his research, the content of his conversations with other tax experts, the reasoning that led him to his conclusions about the tax shelter in question, and his state of mind from 1974 to 1977 would have been critically beneficial and unquestionably relevant. Though some of these points were touched upon at trial by way of cross-examination of Government witnesses, there was simply no way that the above matters could have been fully presented to the jury without the petitioner taking the stand.

Despite all of the above, when petitioner reiterated his desire to testify after the Government had completed its case, trial counsel insisted that he not take the stand. Petitioner asserts that when he persisted with his request to testify, trial counsel told him that he did not want him to take the stand. Moreover, trial counsel warned him that if he attempted to take the stand, over his

objection, he would petition the court to withdraw as his counsel. Petitioner asserts that he was convinced that trial counsel's request would be granted, which would have left him in the position of having to represent himself in the midst of trial. Petitioner did not wish to act as his own counsel, so he relinquished his right to testify.

Petitioner's allegations, in this regard, are supported by his wife, who was a party to the conversations between himself and trial counsel. Her statement is contained in an affidavit which is designated Appendix E.

It should also be noted that though the record does not contain any verification of petitioner's account of trial counsel's "warning" or "threat", it does conclusively establish that petitioner's failure to testify was the result of a decision by trial counsel:

> "Likewise, you see, it becomes especially important in this case because I made a judgment which you heard when I stood up over there this morning, a judgment not to put David Groom on the witness stand. I will not discuss with you the reasons that I had in mind in making that decision, but I will draw this to your attention: Judge Cohill will tell you as a matter of law that you are not to draw any inferences or any conclusions from the fact that Mr. Groom did not take the witness stand. And he will also tell you, I believe, as a matter of law, that a defendant may rely on the evidence brought out in cross-examination of witnesses for the government. That is my judgment. Don't hold that against David Groom in any way. My judgment." (District Ct. Tr. Transcript, p. 34a).

In addition to the failure (or rather, refusal) of trial counsel to call petitioner as a witness, he also failed to call a certified public accountant, Mr. Anthony Zukauckas, who had reviewed petitioner's "tax shelter" theory, and was ready and able to offer his expert opinion as to the soundness of that theory. This witness was made known to trial counsel, and he was even interviewed by him. Nevertheless, he was not called as a witness, in spite of the fact that he was physically present at the trial on numerous occasions.

There were also a number of character witnesses that were suggested to trial counsel by petitioner. However, for some inexplicable reason, none of these witnesses were called upon to testify.

This situation is all the more onerous when one considers the fact that the conclusion of the Government's case, trial counsel rested on behalf of the defense without calling any witnesses or attempting to introduce any type of evidence whatsoever. Thus, in a case where a key Government's witness conceded that a legitimate difference of opinion could exist as to the critical issue of the propriety of petitioner's tax shelter plan, he was precluded from presenting any evidence to the jury that would have bolstered his claim that his tax advice was given without any criminal intent.

On the appeal which was filed by trial counsel, a panel of the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court, and held that the evidence presented at trial was sufficient, as a matter of law, to support the jury's verdict of guilty (Appendix A). By the time the petition for rehearing was filed with the Third Circuit Court of Appeals, petitioner was represented by present appellate counsel.

The petition for rehearing was grounded upon two contentions: (1) that the petitioner was unconstitutionally prevented

from testifying at trial on his own behalf because of the threats of trial counsel, and (2) that trial counsel was ineffective for failing to call any witnesses or present any evidence for the defense where there were witnesses who were ready and able to offer significant testimony. The Court of Appeals denied the petition for rehearing on the grounds that it raised issues not presented to the District Court (Appendix B). That fact was conceded in the petition itself, but it was petitioner's contention that such issues could not possibly have been raised in the District Court or in the original appeal, because his trial counsel could not and would not make such an argument against himself. Nonetheless, the Court of Appeals did stay its mandate pending the filing of petition (Appendix C).

REASONS FOR GRANTING THE WRIT

I.

The evidence presented at trial was not sufficient as a matter of law to support the jury's verdict of guilty where the Government's expert witness conceded that the propriety and legality of petitioner's tax deferral theory was one that could be supported by tax experts.

It is axiomatic that the standard of review to be applied by this Court in reviewing the sufficiency of the evidence is whether there is sufficient record evidence such that a rational trier of fact could find proof of guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 324 (1979); *Gov. of Virgin Islands v. Christensen,* 3rd Cir. No. 80-2525 Slip Op. filed March 16, 1982. *See generally, Glasser v. United States,* 315 U.S. 60 (1942).

The petitioner recognizes that in attacking the sufficiency of the evidence following a jury's verdict of guilty he has a heavy burden, *United States v. Kates,* 508 F. 2d 308, 310 (3rd Cir. 1975), and that the court must view the evidence in a light most favorable

to the prosecution, *United States v. Klein,* 515 F. 2d 751, 753 (3rd Cir. 1975), *United States v. DeCavalcante,* 440 F. 2d 1264, 1273 (3rd Cir. 1971). The courts acknowledge, however, that a "mere modicum" of evidence is insufficient to support a guilty verdict, *United States v. Marolda,* 648 F. 2d 623, 624 (9th Cir. 1981), *citing Jackson v. Virginia, supra,* 443 U.S. at 319; and the cases further require the appellate court to judge whether "reasonable minds could have found the evidence inconsistent with every reasonable hypothesis of the defendant's innocence," *United States v. Ocanas,* 628 F. 2d 353, 360 (5th Cir. 1980), *reh. denied,* 633 F. 2d 582, *cert. denied,* 101 S. Ct. 2316 (1981). Measured against these standards, the trial evidence was legally insufficent and this Court should therefore reverse the judgment of conviction and remand the case to the District Court with instructions to enter a judgment of acquittal.

It was established at trial that David Groom is a certified public accountant who, throughout the period of the indictment years and before, maintained an office for private practice of public and tax accounting. He also taught accounting at Indiana University of Pennsylvania located in Indiana, Pennsylvania. In addition to his accounting practice and his teaching responsibilities, he was involved in various businesses, many of them related to the coal industry. For example, he was the owner of B & G Coal Company, an entity extensively involved in the instant case, and was the incorporator of several other coal companies and coal-related businesses which are not involved in this matter (12a-18a).

The petitioner first met John Harmon, one of the principal characters in this saga, in approximately 1971 or 1972 in connection with Mr. Groom's representation of people leasing a piece of property to John Harmon (18a). Thereafter, John Harmon, chief executive officer of Harmon Coal Corporation, retained David Groom to advise him with respect to state corporation taxes. Through Mr. Groom's efforts with the state corporate tax officials,

John Harmon received a refund of approximately $87,000 of a total $110,000 which had previously been paid (19a-20a). Approximately at that same time, the petitioner became the administrator of Sam Harmon's estate. Sam Harmon was John Harmon's brother who was killed in an airplane crash (20a). Through these associations, the petitioner became the accountant for the Harmon mining interests.

The year 1974 was an excellent financial year for coal producers, as the increased demand for coal resulting from the oil shortage drove prices up. In approximately March or April of that year John Harmon consulted his accountant, the petitioner David Groom, and asked him whether he knew of any way to defer paying taxes because 1974 promised to be such a good year (21a). The petitioner did not immediately respond to this request for advice. Instead, he advised John Harmon that he would have to research the matter and get back to him.

Although the petitioner was not permitted to testify at trial, his secretary of many years provided the jury with substantial insight into this research which he had promised Mr. Harmon he would do. The petitioner instructed his secretary that he would not take any telephone calls and he locked himself in his office for approximately three weeks. Although his secretary Linda Ribbeck could not testify as to the exact course of his research, she was at least able to describe the then existing state of affairs. The petitioner was "literally surrounded" by volumes of tax books (24a). The tax materials available to Mr. Groom, in his office, included Prentice-Hall, CCH and the Research Institute of America. At the end of this three week period of time, he announced to Ms. Ribbeck "I think I am on to something. I think I have something here. I want to check it out first" (25a). He then instructed his secretary to telephone a CPA at the Pittsburgh office at Peat, Marwick & Mitchell, a large, national accounting

firm and had a discussion. Thereafter, he spoke by telephone with tax attorney David Wasserstrom of Philadelphia (25a-26a).

At the end of this intensive research effort, David Groom went back to John Harmon, recounted some of his research efforts, and advised that he had set up a brokerage company into which the coal receipts could be paid so that there would not be any tax due from the coal producer at that time (21a-23a). When the coal receipt money would be paid from the brokerage firm, B & G Coal Company, to the Harmon mining interests, Harmon Coal Company or Harmon Mining Company, then the income would be recognized for tax purposes by being entered into the books and records of the Harmon businesses as coal sales (26a).

The petitioner was charged in sixteen counts with willfully advising the preparation of false or fraudulent individual and partnership tax returns for the years 1974 through 1977 in connection with John Harmon, Ken Harmon, Harmon Mining Company, Harmon Coal Company and Thomas and Shirley Huff. There was no dispute at trial that Mr. Groom had in fact given the advice pertinent to the preparation of the tax returns and had in fact prepared the tax returns specified in the indictment. The tax returns at issue were prepared in accordance with the advice that petitioner first gave to John Harmon and later gave to Thomas Huff in 1974. That is, the receipts which were reported on the tax returns were only those receipts actually received by the taxpayers and did not include those receipts which were received by B & G Coal Company but not actually turned over to the taxpayers.

According to the Government's trial theory, this resulted in a significant underreporting of income for 14 of the 16 tax returns and, in the case of the Huffs, an overreporting of income for the tax years 1975 and 1976 when there was actually no coal sale

activity for the Huffs. In light of the petitioner's trial posture regarding his preparation of the returns specified in the indictment, the only issue at trial, and the only issue involved in this aspect of the appeal, was whether the petitioner's tax advice was willfully false and fraudulent.

The statute under which the petitioner was prosecuted, 26 U.S.C. §7206(2), provides:

> "Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .shall be guilty of a felony. . . ."

The word "willfully", as that word is used in the statute, connotes a voluntary, intentional violation of a known legal duty. The Supreme Court has formulated the requirement of willfulness as including bad faith or evil intent, evil motive and want of justification in view of all the financial circumstances of the taxpayer. *United States v. Bishop*, 412 U.S. 346, 360 (1973), *citing United States v. Murdock*, 290 U.S. 389, 398 (1933), and *Spies v. United States*, 317 U.S. 492, 498 (1943). As the Court elaborated in *Spies*,

> "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." 317 U.S. at 496.

Section 451 of the Internal Revenue Code, 26 U.S.C. §451, provides:

> "The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period."

In the 1973 edition of Prentice-Hall, Federal Taxes, paragraph 20,161, p. 20,151, it is stated:

> "Certain ideas circumscribe constructive receipt. The doctrine applies only where the taxpayer's control of with the item credited is unrestricted. Thus, a sum is not constructively received if it is only conditionally credited; or if it is indefinite in amount; or if the payor has no funds with which to pay the credits. . ."

Applying these principles to the case at hand, one can see that there are several reasons militating against constructive receipt by the taxpayers in the year coal sale proceeds were received by B & G Coal Company. The record is replete with evidence that petitioner, without authorization from the taxpayers, used substantial sums of money for his own purposes, or at least for purposes inconsistent with the understanding of the taxpayers. John Harmon testified on direct examination by the prosecution that he did not authorize B & G's expenditures to or investments in Pow-R-Tron (28a), Elaine Aire, Inc., Contact, Inc. (28a), Eastern Coal Resources, Eastern Deaton Coal Company (29a), Eastern-Plocus Resources, or petitioner's own personal expenditures. Accordingly, the trial evidence does not clearly show

that the B & G funds were immediately available to the taxpayers, and hence constructively received by them.

Perhaps the most revealing evidence that was offered at trial on the issue of the petitioner's state of mind in giving the tax advice that resulted in the preparation of the tax returns in issue was the aforementioned testimony of Special Agent Gloekler, one of the two investigating agents of the Internal Revenue Service. Agent Gloekler's testimony made it clear that even the Internal Revenue Service recognized the considerable latitude that existed in one's interpretation of such "terms of art" as "constructive receipt."

It is of course not unusual for the Internal Revenue Service and a taxpayer or tax advisor to have a difference of opinion regarding the proper interpretation and application of the Internal Revenue Code. Such disputes are regularly resolved by administrative procedures within the Treasury Department, by the Tax Court, by the District Courts, by the Courts of Appeals, and, even on occasion, by the United States Supreme Court. In this case the Government contends that the tax advice that petitioner gave was not only wrong, as a matter of law, but was given with such a pernicious intent that he should be subject to criminal penalties. As the above discussion indicates, however, this case actually involves nothing more than a frank difference of opinion between various knowledgeable people regarding the construction and application of the Internal Revenue Code, and should not even be the subject matter of a criminal proceeding.

Interestingly, it is not infrequent for the Internal Revenue Service itself to urge a particular construction of the tax laws, even after it has lost the same argument in other courts. The most recent example of such a situation in this Circuit appears in *Sun Company, Inc. v. Commissioner*, 3rd Cir. No. 81-1997, Slip Op. filed April 16, 1982. At issue in *Sun Company* was the deductibility

of intangible drilling and development costs in the context of offshore exploratory drilling. The Commissioner urged that a particular interpretation of the pertinent statute and its regulations, which interpretation had been rejected by the Tax Court on four separate occasions, not including the *Sun Company* case in the Tax Court. Slip Op. at 9. Notwithstanding the apparent "clarity" of the legal issue involved, the Commissioner assessed a deficiency and the taxpayer filed suit in the Tax Court and won, thus bringing to five the number of court decisions contrary to the Commissioner's interpretation. This Court agreed with the Tax Court and affirmed the lower court decision in the taxpayer's favor.

The foregoing analysis demonstrates that there was sufficient doubt regarding the reportability by the taxpayers in the year coal sale proceeds were received by B & G Coal Company, viewing the evidence in a light most favorable to the prosecution, that the Government failed as a matter of law to introduce sufficient evidence of the petitioner's "willfulness" in giving the above tax advice and preparing the tax returns consistent with such advice to sustain the jury's verdict of guilty. The trial evidence, viewed in a light most favorable to the prosecution, did not eliminate every reasonable hypothesis of the petitioner's innocence. *United States v. Ocanas, supra.* In light of the fact that the Government's own witness, Special Agent Gloekler of the criminal investigation division of the Internal Revenue Service, admitted that there "might well be" a difference of opinion between people of equal expertise, there is insufficient evidence as a matter of law to establish that petitioner is guilty of the offenses of which he now stands convicted.

II.

A new trial is warranted where there is substantial and credible evidence that the petitioner was prevented from testifying in his own behalf as a result of his trial counsel's threat to withdraw his representation if he took the stand.

The statement of the case outlines facts which make it clear that it is petitioner's contention that the only reason that he did not take the stand to testify on his own behalf was because his trial counsel threatened to withdraw if he did so. Thus, petitioner's constitutional right to counsel, as guaranteed by the Sixth Amendment, could only be retained if he relinquished his right to present evidence on his own behalf.

The present state of the law is such that there is no unanimity on the question of whether a criminal defendant has a constitutional right to testify in his own behalf. Though there are a line of cases which hold that a criminal defendant has no such constitutional right to testify, *State v. Hutchinson,* 458 S.W. 2d 553 (Mo. 1970) (en banc); *Kinder v. Commonwealth of Ky.,* 269 S.W. 2d 212 (Ky. 1954), the opposing view seems to be the prevailing one, *Alicea v. Gagnon,* 675 F. 2d 913 (7th Cir. 1982); *Ashe v. North Carolina,* 586 F. 2d 334 (4th Cir. 1978), *cert. denied,* 441 U.S. 966, 99 S. Ct. 2416, 60 L. Ed. 2d 1 (1971); *United States ex rel Wilcox v. Johnson,* 555 F. 2d 115 (3d Cir. 1977); *see Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The factual situation in *United States ex rel. Wilcox v. Johnson, supra,* is analogous to that of the instant case. In *Wilcox,* the defendant indicated to his attorney that he wished to testify on his own behalf, and that his testimony was in the nature of an alibi. His attorney conferred with the trial judge, and returned to tell Mr. Wilcox that she (the trial attorney) would be permitted

to withdraw if he insisted on testifying, and that he would be required to represent himself for the remainder of the trial. The *Wilcox* court condemned this trial "tactic" on the part of defense counsel, and held that the defendant was entitled to a new trial:

> "As in Garcia, the appellee here 'was put to a Hobson's choice': decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel. The Trial Judge thus conditioned the exercise of Mr. Wilcox's statutory right to testify upon the waiver of rights guaranteed by the Constitution. This was an impermissible infringement upon the appellee's right to testify and his Sixth Amendment right to counsel.
>
> A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." (*supra* at 120).

Obviously, *Wilcox* presents a factual situation where the trial judge *purportedly* made a ruling as to a defense counsel's motion to withdraw, which is not the case here. However, the chilling effect of trial counsel's threatened abandonment is virtually identical. It is submitted that assuming *arguendo* that petitioner was given such a "warning" by trial counsel, the constitutional prohibition resulting from the so-called "Hobson's choice" would be dictated by the reasoning in *Wilcox*. *Cf.*, *Wright v. Estelle*, 572 F. 2d 1071 (5th Cir. 1978) (dissenting opinion).

In *Alicea v. Gagnon, supra,* the Court of Appeals for the Seventh Circuit had the occasion to consider the constitutionality of Wisconsin's alibi-notice statute. One of the holdings that had to be arrived at before the constitutional issue could be reached was whether the defendant's "right" to testify was of constitutional proportions. After reviewing the issue from the time when defendants were actually incompetent to testify up to the present, the court concluded, "We therefore hold that a criminal defendant has a constitutional right to testify in his own behalf under the fifth, sixth, and fourteenth amendments." *supra* at 923.

By way of dicta, the Supreme Court has generally supported the *Gagnon* and *Wilcox* reasoning. In *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), the Court indicated that "every criminal defendant is privileged to testify in his own defense, or to refuse to do so". *Id.* at 225. The Court carried the doctrine a step further in *Brooks v. Tennessee,* 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), when it suggested that "whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right". *Id.* at 612. Following this line in *Farretta v. California, supra,* the Court listed a defendant's right to testify as one of several constitutional rights "essential to due process of law in a fair adversary process". *Id.* at 819, n. 15.

It is submitted that if a defendant's right to testify is a right which is constitutionally derived, then it is reversible error for that right to be tampered with by a trial attorney's threat of withdrawal if the defendant does not go along with his tactical wishes. The reputed facts of the instant case necessitate a reversal for all of the above reasons.

III.

A new trial is mandated by the denial of effective assistance of counsel where no defense testimony or evidence is offered at trial, despite the fact that (a) the petitioner insisted on testifying, (b) an expert accounting witness was interviewed and available to endorse the propriety of petitioner's tax deferred plan, and (c) numerous character witnesses could have been secured if trial counsel had chosen to utilize them.

It has already been stated, and the record establishes conclusively, that trial counsel made no attempt to put on a defense for petitioner despite the fact that there was testimony and evidence available. That fact, standing alone, does not render counsel ineffective as a matter of law. However, within the context of petitioner's trial, there appears to be no reason why the various witnesses were not called. Since there was no testimony, their testimony could not possibly have been cumulative. There doesn't seem to be any way that petitioner could have been prejudiced by testimony that his tax theory was supported by other experts or testimony attesting to his good character.

It is well established that where a criminal defendant raises allegations of ineffective assistance of counsel, "(T)he standard of adequacy of legal services, as in any other profession, is the exercise of the customary skill and knowledge which normally prevails at that time and place". *Moore v. United States*, 432 F. 2d 730, 736 (3d Cir. 1970) (en banc). Furthermore, even if the defendant can demonstrate incompetency, he must also shoulder the burden of proof in establishing a substantial prejudice as a by-product of the breach of duty. *United States v. Defalco*, 644 F. 2d 132, 135 (3d Cir. 1979).

Even with this substantial burden, it is submitted that, as a matter of law, ineffective assistance of counsel is established

where the defendant is precluded from putting on an available defense and forced to defend himself solely on the basis of inconsistencies and defects in the Government's case. The prejudice to petitioner, in such a situation, is glaringly obvious, and constitutes grounds for a new trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
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(202) 393-3514

Of Counsel:

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APPENDIX A — JUDGMENT ORDER OF AFFIRMANCE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3105

UNITED STATES OF AMERICA

v.

DAVID H. GROOM

David Groom, Appellant

(Criminal No. 81-00058 — W.D. Pa. — Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
September 15, 1982

BEFORE: SEITZ, *Chief Judge,* ROSENN and GARTH, *Circuit Judges.*

After consideration of the contention raised by appellant, to-wit, that the evidence presented at trial was insufficient as a matter of law to support the jury's verdict of guilty, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/Seitz
Chief Judge

Appendix A

ATTEST:

s/Sally Mrvos
Sally Mrvos, Clerk

Dated: SEP 16 1982

Certified as a true copy and issued in lieu of
a formal mandate on October 8, 1982.

Test: s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B — ORDER DENYING PETITION FOR PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 8, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3105

UNITED STATES OF AMERICA

v.

DAVID H. GROOM,

DAVID GROOM, Appellant

(Criminal No. 81-0058 — W.D.Pa. — Pittsburgh)

PRESENT: SEITZ, *Chief Judge,* GARTH and ROSENN, *Circuit Judges.*

The petition for panel rehearing concededly raises issues not presented to the district court.

ORDERED that the petition for panel rehearing is denied. See *U.S. v. Sturm,* 671 F.2d 749, 750-51 (3d Cir. 1982).

s/ Seitz
Collins J. Seitz
Chief Judge

DATED: November 8, 1982

APPENDIX C — ORDER TO STAY MANDATE UNTIL DECEMBER 15, 1982 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No, 81-3105

UNITED STATES OF AMERICA

vs.

DAVID H. GROOM,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 15, 1982.

s/ Seitz
Chief *Judge*

Dated: NOV 18 1982

APPENDIX D — ORDER GRANTING PETITION TO FURTHER STAY MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 18, 1982

CLARK, McGILL & SEAY
BY: THOMAS L. McGILL, JR., ESQUIRE
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(215) 568 6633 ATTORNEY FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COURT OF APPEALS

CRIMINAL NO. 81-3105

W.D. PA. - PITTSBURGH

UNITED STATES OF AMERICA

vs.

DAVID H. GROOM

AND NOW, this day of , 1982, it is hereby ORDERED that Appellant's Petition for Stay of Mandate Pending Application For Writ of Certiorari to the Supreme Court,

Appendix D

pursuant to F.R. App. P. 41 (b) is Granted for a period of thirty (30) days.

BY THE COURT:

_____

J.

APPENDIX D — PETITION FOR STAY OF MANDATE TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CLARK, McGILL & SEAY
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COURT OF APPEALS

CRIMINAL NO. 81-3105

W.D. PA. - PITTSBURGH

UNITED STATES OF AMERICA

vs.

DAVID H. GROOM

AND NOW, this 12th day of NOVEMBER, 1982, DAVID H. GROOM, Appellant in the foregoing Appeal and Petition in the herein petition, by his counsel, THOMAS L. McGILL, JR., ESQUIRE, hereby petitions, pursuant to F.R. App. P. 41, for a stay of the issuance of the mandate of this Court pending

application for a writ of certiorari to the Supreme Court. In support of the petition, counsel for Appellant offers the following:

1. On April 9, 1981, Mr. Groom was indicted on sixteen (16) counts of violation of Title 26, U.S.C. §7206(2). Petitioner was charged with wilfully and knowingly advising the preparation and presentation of various income tax returns of others which were allegedly false and fraudulent as to material matters. The matter was tried in the United States District Court for the Western District of Pennsylvania before the HONORABLE MAURICE B. COHILL. The trial jury adjudged him guilty as to all counts. On November 6, 1981, Mr. Groom was sentenced to two years imprisonment to be followed by two years probation, and a fine in the amount of $16,000 was imposed.

2. Petitioner, by his trial counsel, filed a Notice of Appeal on November 11, 1981. The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court in a judgment-order dated September 16, 1982. Mr. Groom replaced his original counsel, THOMAS B. RUTTER, ESQUIRE, and secured the services of present counsel on September 22, 1982.

3. On September 29, 1982, present counsel filed a Motion for Enlargement of Time Within Which to File Petition for Rehearing. That motion was granted by this Honorable Court, and the time for filing was extended to October 29, 1982. Petitioner's Petition for Rehearing was denied on November 8, 1982.

4. The Petitioner intends to file a petition for Writ of Certiorari to the Supreme Court of the United States. Federal Rule of Appellate Procedure Rule 41(b) provides that a stay of the mandate may be granted pending application for a writ of certiorari to the Supreme Court of the United States.

Appendix D

WHEREFORE, it is respectfully requested that this Court grant a stay of the mandate pending the application for a writ of certiorari to the Supreme Court of the United States by the Appellant.

Respectfully submitted,

CLARK, McGILL & SEAY

BY: Thomas L. McGill, Jr.
THOMAS L. McGILL, JR.,
ESQUIRE

APPENDIX E — AFFIDAVIT OF PETITIONER'S SPOUSE ON PETITION FOR REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CRIMINAL NO. 81-3105

UNITED STATES OF AMERICA

vs.

DAVID H. GROOM

Affidavit of ELAINE GROOM in support of APPELLANT'S PETITION FOR REHEARING

State of Pennsylvania

:ss.:

County of Philadelphia

Elaine Groom, being first duly sworn, deposes and says:

1. I am the wife of the above-named defendant, and I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of my Petition for Rehearing.

2. I was present throughout the trial of my husband in the United States District Court for the Western District of Pennsylvania from September 21, 1981 to October 5, 1981. My husband was represented by Thomas B. Rutter, Esquire, who frequently consulted with my husband, in my presence. At the conclusion of the testimony of one of the government's expert witnesses, my husband told Mr. Rutter that he wished to take

Appendix E

the stand and testify on his own behalf. Mr. Rutter responded with a warning to my husband that if he took the stand, he would withdraw immediately as his lawyer. He stated to my husband that he could always get another attorney or even represent himself at trial. My husband declined either of those options, because he did not see how he would be able to handle them. Despite his desire to do so, my husband did not take the stand.

s/ Elaine Groom
ELAINE GROOM

Sworn to and subscribed
before me this day of
September, 1982.

_____
NOTARY PUBLIC

APPENDIX F — EXCERPTS OF TRIAL TRANSCRIPT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[pp. 335-341]

* * *

about the coal brokerage, yes? A. Yes.

Q. And also about coal production, yes? A. Yes.

Q. The Eastern Coal Resources, was that engaged in coal business in Kentucky as well as in Pennsylvania? Where was this place of operation? A. Eastern Coal Resources, the main place of operations was in our office. I mean, that is where the main checkbook was.

Q. And was the business it was engaged in coal production? A. Coal brokerage.

Q. Coal brokerage. That was in addition to B & G then? A. Yes, sir.

Q. Okay. Now, we have heard about — I am going to skip the non-coal companies for a moment. We have heard about Eastern Deaton Coal Company. That was a partnership that was formed, wasn't it? A. Yes, sir.

Q. That was a partnership formed between, what, Eastern Coal Resources, or Mr. Groom personally? A. Mr. Groom.

Appendix F

Q. Mr. Groom personally and a Dr. Deaton, was it, or Mr. Deaton? A. Robert Deaton.

Q. What was the purpose of that partnership as you understood it from being in the office and working with the books and records of that company? A. It was to operate a coal mine, strip job, located in Harlan, Kentucky.

Q. And that was a strip job which it took over from this person in Harlan, Kentucky, yes? A. Yes, sir.

Q. And Mr. Garrett asked you a series of questions about these checks that the judge has told the jury to compartmentalize, but there were payments to and on half of this strip job down in Harlan, Kentucky; is that so? A. Yes.

Q. And when you were talking about payments made to creditors of Mr. Jones, do you remember those answers? A. Yes.

Q. Mr. Jones was the previous strip operator in that location; is that right? A. Yes, sir.

Q. And are we to understand that part of the way in which Mr. Jones was paid for taking over coal leases for stripping was that Mr. Jones' creditors were paid? A. Yes, sir.

Q. That is, instead of giving the money to Jones who would then give it to the creditor, it was given directly to the creditor? A. Correct.

Appendix F

Q. In connection — let me ask you this question: Were you working with Mr. Groom when this Harlan strip operation was commenced? A. Yes, sir.

Q. And did he ever discuss it with you in your presence, or did you know anything about the business other than the strippling operation? A. With relationship to what?

Q. Did you have the impression that Mr. Groom was embarking upon this stripping operation in Kentucky for the purpose of making a profit, or was he just throwing money away? A. For the purpose of making a profit.

Q. Based upon what you saw and heard, did Mr. Groom at that time — was it your impression that he considered this stripping operation in Kentucky to be a good business investment? A. Yes, sir.

Q. And was the mine in fact operated, the stripping operation, in fact operated? A. Yes, sir.

Q. That is where he was spending a lot of his time in 1978 and '79 when you ultimately decided to go on and find other employment? A. Yes, sir.

Q. The Eastern-Plocus Resources Company, that is a partnership formed between Mr. Groom and Mr. Van Plocus? A. Correct.

Appendix F

Q. What was the purpose of that partnership? A. As I understood it from Mr. Groom, they were going to try and locate land which had coal deposits on it, try to arrange leases on those lands, and then in turn release it or sell the leases to jobs, or Mr. Groom at one time even talked about possibly shipping the coal or even deep mining the coal.

Q. Do you know whether in fact Eastern-Plocus Resources ever acquired any leases or acquired any acreage? A. No, sir, I do not.

Q. But, in any event, as you described it, one of the ideas involved in Eastern-Plocus was to acquire leases; that is, Mr. Groom's partnership would get the leases, and then, if not mine it themselves, to sell the leases to other people? A. Correct.

Q. Are you acquainted with the term "lease broker" in the coal business? A. Only in a general sense.

Q. And this kind of business where one person buys leases and then sells them to a third person, and he doesn't mine it himself, that is the lease brokerage business; isn't it? A. Yes, sir.

Q. And that is a little different from the coal brokerage business, isn't it? A. Yes.

Q. Now, let's go and look at the other companies. All of those activities are being engaged

in: the C.P.A., the coal business, and all these other activities are all being engaged in at the same time? A. Yes, sir.

Q. Not meaning an ethic [sic] slur, but sometimes like a Chinese fire drill; would that be fair to say? A. Yes, sir.

Q. Okay. Now, the other companies that Mr. Garrett asked you about were a Pow-R-Tron — You told us that was a corporation bought by Mr. Groom, and it manfactured electromagnetic hammers, yes? A. Yes, sir.

Q. What was the financial condition of that company when it came to Mr. Groom's attention? A. It was in dire financial trouble. That is the reason the gentleman who had owned Pow-R-Tron had been an accounting client of Mr. Groom, and he came to Mr. Groom and said, you know, "I have this second business, and it is losing money left and right, and I want to get rid of it. See if you can find a buyer." And Mr. Groom could not find a buyer for it. But in going out and going over the inventories and so on and so forth, he thought it was a good buy. So he bought it himself.

Q. He became the owner of Pow-R-Tron? A. Yes, sir.

Q. Did you, Miss Ribbeck, ever have any involvement with that company; did you do any business with it; did you do any work for

it? A. Yes, sir, I kept the books on Pow-R-Tron, and I also, the first year that we purchased Pow-R-Tron I spent a good deal of my time — as a matter of fact, I spent, I would say, probably 85 percent of my time the first year after Mr. Groom purchased it trying to pick up the sales for Pow-R-Tron, contacting people who bought our hammers for lease purposes, you know, that they would rent them out to other people like rental places, you know, to try and get them to start buying the hammers again. I spent a great deal of time the first year after Mr. Groom purchased the Pow-R-Tron company trying to pick up the sales of the business.

Q. This was in addition to your performing all the other duties that you described for us as a secretary and bookkeeper and so forth? A. Yes, sir.

Q. When Pow-R-Tron was acquired by Mr. Groom, when you were working for it, did you and he consider it to be a viable business entity, a wise business investment, or were you throwing money away? A. Mr. Groom thought that it was a very wise investment. He felt that, you know, it could be built up into something quite respectable.

Q. And another company that you mentioned is Elaine Aire. That Elaine, again, is Mr. Groom's wife's name, yes? A. Yes.

Q. And the word "Aire." And you say it owned two things: One was a computer, yes? A. Yes.

[p. 429]

A. Yes, sir.

Q. In this case? A. Yes, sir.

Q. And was the reason for that that you had indicated that you would not answer questions unless you had such an order granting you immunity from prosecution on the basis of whatever testimony you would give? A. Yes, sir.

Q. Now, Mr. Harmon, are you acquainted with the defendant David H. Groom? A. Yes.

Q. How did you first become acquainted with Mr. Groom? A. I think the first original contact with Mr. Groom was I was leasing a piece of property, and he represented some of the people on the opposite side, and that is how I got to meet Mr. Groom.

Q. Do you recall about when that was? A. Must have been around '71 or '72, in that bracket.

Q. Subsequent to your initial meeting with him, did you generate any kind of business relationship with Mr. Groom? A. I don't understand the question, sir.

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[pp. 473-474]

Q. And, of course, the government right away saw the error of its ways and gave you your money back, didn't they? A. About three years later after they checked and rechecked two, three or four times.

Q. Did you or Mr. Groom have to go to Harrisburg or to court or to Pittsburgh or someplace like that to get the money back? A. I didn't, but I am almost sure Mr. Groom did.

Q. In other words, if the jury and I can understand it correctly, when Mr. Groom on behalf of your company went to the authorities and said, "Mr. Harmon's company paid you too much taxes," they said, "No, no, we don't agree with that," and they quarreled with him; they argued back and forth on that subject, right? A. Yes. I left that up to Mr. Groom. He is a tax man, and I am not.

Q. And you say about three years later he finally persuaded them he was right and got your money back? A. I got my money back.

Q. 100 percent of it? A. No, if I recall right, I think it was $87,000.

Q. Now, likewise, sir — Well, I will not say likewise — after he had represented you in this problem with the tax people, did he then become the regular general accountant for you and your

company and the members of your family? A. Yes.

Q. And indeed was he the administrator or the executor of your brother's estate when he was killed in that plane crash? A. Yes, he was the administrator of my brother's estate.

Q. And your brother's name was Sam? A. Yes.

Q. And this accident also took your mother, sir, didn't it, sir? A. Yes.

Q. It occurred in 1973? A. Yes.

Q. Mr. Groom then was the executor, the person in charge of collecting and administering the assets of this estate, right? A. Yes.

Q. And you trusted him and had confidence in him then, didn't you?

[p. 435]

A. Well, the tipple is where the coal is brought. It is located on the railroad. And all the coal is trucked into this particular point. And from there it is processed and loaded on rail. And a few years ago back why we run washing plants and air tables which, you know, it is complicated loading, but the last few years why we do not run them. They are still available, but we don't run

them because the environmental laws are just too complicated.

Q. I would like to direct your attention to the year 1974. How was business in 1974 in terms of business; was it a good year or a bad year? A. Well, up in through '72 or up through years and years, the coal business was really a struggle to survive. In 1974, whenever, that was one of the years facing ahead of the strike of the United Mineworkers, so they started to stockpile coal. Everybody did. So at that particular time '74 was starting to be making a lot of business. And we was starting to getting some decent prices for our product.

Q. And as a result of that, did you anticipate that you would be making a lot of money in that year?

MR. RUTTER: I object to the leading of the witness now in the substantive testimony.

THE COURT: We will sustain.

[pp. 437-438]

Q. Okay. I think my question was whether you undertook to consult with anybody in connection with this expectation of a lot of income? A. Yes. Mr. Groom was my accountant, so I consulted with him.

Appendix F

Q. What was the nature of the conversation that you had with him at that time? A. Well, you know, I can't recall the words, but I think, you know, it boiled back to we was expecting a good year, and I was wondering if there was somehow that I could, you know, defer paying of taxes, you know, on just one good year.

Q. Did Mr. Groom respond to that inquiry by yourself right away? A. No, he said he would have to do some research work, and he would get back to me.

Q. And at a later time did he get back to you? A. Yes.

Q. Now, would you please tell the ladies and gentlemen of the jury what Mr. Groom said to you when he got back to you? A. Well, I am not sure, but I think it was a month or six weeks later that Mr. Groom got back to me and he said he had done a lot of research work and that he had come up with a brokerage outfit that the money could be paid into the brokerage there and wouldn't be charged taxes for it at that moment.

Q. Now, the money that he was talking about which could be paid in, what money was that? A. Well, that would be something, you know, receipts of some of the coal from Harmon Mining Company.

Q. You mean the receipts for your normal business transactions?

MR. RUTTER: That is objected to, Your Honor.

THE COURT: Sustained.

BY MR. GARRETT:

Q. Well, when you say receipts for the Harmon Mining Company, what do you mean by a receipt? A. Well, maybe the receipts wasn't the right word. But some of the money that the coal was sold, the money that was paid for the coal, would be, was funneled into what at that time was called, it would be called B & G, and that it would go into B & G rather than go across my books at that particular time.

Q. Let me get back to your reference to the books. But this money which was to be from your coal sales, how was it to be put into the brokerage; what did Mr. Groom tell you about how that could be done? In other words, what I am asking —

MR. RUTTER: Excuse me, Your Honor, Might . . .

* * *

[pp. 350-352]

engaged in research using these books? A. Yes, sir.

Appendix F

Q. Can you tell us, please, some of the details about that, what you remember about that occurrence? A. As I said, in 1974 the price of coal was quite high. Mr. Groom had expressed to me a concern about the amount of money that he was sure that several of his coal clients would be earning by the end of the year. And he expressed to me an interest in seeing that if he could not work out some kind of a tax shelter for these people that he could get them into that it would decrease the amount of taxes that they would have to pay at the end of a year. So he did something which was quite out of the ordinary for Mr. Groom, he gave me specific instructions that he was not taking any telephone calls, and he shut the doors in his office, which is something that Mr. Groom did not do in a normal course of events. He did it so rarely that when the door was shut I knew just to not disturb him. And for a period of about three weeks Mr. Groom remained in his office with the door shut and did not take phone calls. And he did research work.

Q. And how do you know he did research work in his office with the door closed and the phone turned off? A. Because I kept taking him in cups of coffee all the time. And I just put the coffee at his elbow, and he would just be literally surrounded by those volumes of books. I remember him actually sitting on the floor, and a set of volumes to the right of him, and another one to the left, and one up above, and he was sitting there on the floor with these volumes just literally surrounding him.

Appendix F

Q. Now, at the end of the period of time when he had been in his office with the door closed, as you described it, doing research, are you acquainted with any person or persons whom Mr. Groom consulted in connection with this research that he had done? A. Yes, sir. At the end of the three-week period he came out and he said to me, he said, "I think I am on to something. I think I have something here. I want to check it out first. So he asked me to place a call to a gentleman, and I regret to say that I don't remember his name, but it was a gentleman who was a certified public accountant with the firm of Peat, Marwick & Mitchell here in Pittsburgh. And then he, at the end of the conversation, he also asked me to place a call to a gentleman he described as a tax attorney in Philadelphia by the name of Wasserstrom.

Q. Peat, Marwick & Mitchell, who is that, please, so the jurors may be informed? A. Peat, Marwick & Mitchell is a very large accounting firm here in Pittsburgh. And when Mr. Groom first started doing accounting work, he worked for Peat, Marwick & Mitchell.

Q. And were you a party to that conversation; did you listen in on the conversation between Mr. Groom and this Peat-Marwick accountant here in Pittsburgh? A. Not that I recall, no, sir, but I did place a call for him.

Q. And the telephone call to the attorney who Mr. Groom described as what, a tax attorney? A. Yes, sir.

Q. And you recall the name as being what, please? A. Wasserstrom.

Q. And that attorney is located where, please? A. In Philadelphia.

Q. Did you listen in on that conversation or partake in it in any way? A. No, sir.

Q. Therefore, may we understand that you cannot tell us what the discussion was and what advice or information Mr. Groom received?

[p. 442]

Company's books on their ledger sheets and deposited in the bank.

Q. So the money then, when it came back, would be entered on the books? A. Right.

Q. How would it be entered on the books; what would that payment be called on your books? A. Well, you know, I am not 99 percent sure. I would assume it was entered as income under coal sales but you would have to get the girls, the secretaries, to verify it. I am almost sure when it come back, I am sure, or almost positive, it come back as coal sales entered into the book.

MR. RUTTER: Under those circumstances, sir, I move to strike.

THE COURT: We will sustain the objection and we will direct the jury to disregard the witness' last answer. He did testify that he was not sure, and we will ask you to put that answer out of your mind.

BY MR. GARRETT:

Q. What did Mr. Groom advise you, sir, as to payment of taxes on these moneys which would first go into the B & G Coal Company and then come out and go into your books when they came out? A. If I recall right, I would not be charged. . .

[pp. 448-450]

meeting at Slippery Rock, I think there was a check made out about $15,000 to buy out a stockholder to come out of B & G at that particular time.

Q. When you refer to Slippery Rock, what was that? A. That was the shopping center plaza that we was involved in.

Q. You had an interest in Slippery Rock Plaza? A. We was just an investor in it.

Q. That interest was preexisting, or — Let me ask you this: Did that interest exist prior to this event that you are telling us about? A. That was back in '69 or '70, in that area '70 or '71 I think that took place. In what time of the year,

or what year, I couldn't even tell you. In fact, it might even be after '77.

Q. At any time, Mr. Harmon, did Mr. Groom ask you whether or not money from the B & G account should go into an organization known as Pow-R-Tron? A. Not to my knowledge, not in my memory.

Q. Do you know what Pow-R-Tron is? A. Yes.

Q. What is Pow-R-Tron? A. Pow-R-Tron was a small manufacturing plant that Mr. Groom — I don't know how much he owned of it. It made electric hammers to my knowledge.

Q. Do you have any interest or involvement in that company? A. No.

Q. Did you ever authorize any expenditure to be made in a company known as Elaine Aire, Inc.? A. Never heard the name.

Q. You are not familiar with that at all? A. No.

Q. You have no interest in it? A. No.

Q. Did you ever give Mr. Groom authorization to expend moneys from the B & G account for Contact, Inc. A. No.

Appendix F

Q. Do you know what Contact is? A. Yes.

Q. Did you have any personal interest in Contact yourself? A. Yes, Harmon Mining Company owned some certain amount of stock in Contact.

Q. Can you recall how much that was? A. I think the original investment was $10,000. I don't recall how many shares of stock, but there was investments of $10,000.

Q. Other than that investment, did you have any other interest in it at all? A. No.

Q. Did you play any role at all in the operation of that business? A. No.

Q. Did you ever authorize Mr. Groom to expend any moneys from the B & G Company account for Eastern Coal Resources? A. No.

Q. Do you know what Eastern Coal Resources is? A. I heard the name, yes.

Q. Other than having heard the name, do you know anything about it? A. No.

Q. Do you have any interest or involvement in it at all? A. No.

Q. How about Eastern Deaton Coal Company, Mr. Harmon; did you authorize any expenditures for that purpose? A. No.

Appendix F

Q. Are you familiar with that company? A. I have heard the name, yes.

Q. That is the extent of your familiarity with it?

Appendix F

[pp. 1046-1047]

* * *

to be asked with reference to that specific question, to be asked with reference to some particular transactions. So that is why I asked that particular question with respect to these other transactions.

THE COURT: We will let the witness answer.

BY MR. GARRETT:

Q. You may answer the question. A. May I have it again?

Q. Yes, sir. With respect to the check issued to John Harmon in the name B & G Coal Company, is there any legal theory for him not reporting that for Harmon and the Harmon partnership not reporting that as income during the — A. I felt —

MR. RUTTER: So the record may be clear, Your Honor, I object to the question again.

THE WITNESS: I felt that it was Harmon's coal that was being sold. He said so. Therefore, the money for the proceeds of that coal was Harmon's income.

MR. GARRETT: Thank you.

No further questions.

Appendix F

RECROSS-EXAMINATION

BY MR. RUTTER:

Q. Agent Gloekler, perhaps we can simplify this portion of your examination by asking you this question and getting your answer: You have expressed an opinion concerning the reportability by Harmon of the checks to B & G. Would you concede for me, sir, that there are those who might have a difference of opinion on that subject with you? A. Based on the testimony that I heard, sir, that was my opinion based on the testimony and the records that have been admitted into evidence.

Q. I understand that is your opinion. All I am asking you: Would you agree with me that there are those who might hold a different opinion? A. Possibly, yes, sir.

Q. That is say, this is a matter of difference of opinion between people of equal expertise? A. Might well be, yes, sir.

Q. And the reason I asked, sir, is earlier today I asked you about Section 451 of the Internal Revenue Code. And as I understand your testimony, you said that you were not as expert on that — we will say it that way — as expert on that as you are on some other aspects of the Internal Revenue Code; is that fair? A. Yes, sir.

Q. And Section 451 of the Internal Revenue Code is the section to which we look to find all the court's decisions which relate to this particular question, isn't it, sir? A. Yes, sir.

[p. 1051]

Q. Okay. All I am saying to you, Agent Gloekler: The opinions you expressed about when you report a check and what are receipts to whom, they are things that you have an opinion about, yes? A. Yes, sir.

Q. But people with equal competence and equal training could have a difference of opinion, couldn't they, sir? A. Yes.

Q. Neither one of you is wrong in a way that should make you go to jail, are you? A. No, sir.

Q. Suppose you were wrong on the question, would you think you should go to jail for being wrong in your opinion? A. No, sir.

Q. In response to Mr. Garrett's questions, that $113,000 item in 1977 which you say you didn't take into account because it is over in '78 — A. Yes.

Q. — that is one of these negotiated items? A. Yes.

Q. Even if we take that $113,000 out, we still have a lot of negotiated items which Mr. Harmon

took out and kept secret to himself and didn't tell anybody about and didn't report on his income tax; is that right? A. Appears that way.

[p. 1373]

But Mr. Gonta came and took the witness stand and testified. And we can put aside the errors of mathematics and such that he had on his summaries, and we can also put aside the fact that he didn't calculate the depletion correctly. Remember he made that mistake? I don't want to pick on him. I think it is important for you to understand where we are. Mr. Gonta, you know, I said to him — We did the arithmetic. You notice when I started to ask him about that, it was a little difficult getting an answer for a while while he was trying to figure out had [sic] he made a mistake, and, if so, how he was going to explain it without having to admit that, yes, he had made a mistake. And he got the depreciation wrong to the tune of $43,000 in one year. He, the expert, who these people had come in and say that David Groom didn't know what he was doing. In any event, remember Gonta got the depletion wrong. And so after Mr. Garrett had asked him a bunch of questions, the last one which Mr. Garrett said to him was, "Well, Mr. Gonta did you ever have a dispute with anybody in the IRS, any difference of opinion, as to what was gross receipts?" "Oh, no. No, no," and then you will remember I got up and I think I asked the question from here: "Now, Mr. Gonta, did you ever have any dispute with anybody in private practice, . . .

APPENDIX G — RELEVANT DOCKET ENTRIES

Date	Entry
4/9/81	A true bill.
4/9/81	Indictment filed.
4/9/81	Request of U.S. Atty. for issuance of summons; deft. to appear 4/23/81 to post $25,000 or bond and file appearance of counsel.
4/9/81	Summons issued.
4/16/81	Summons returned executed by U.S.M. 4/14/81.
4/23/81	Deft. arraigned before Mag. Sensenich and pleads NOT GUILTY.
4/23/81	Appearance of Alan Turner, Esq. and Thomas B. Rutter, Esq. (From Phila.).
4/23/81	The following rec'd from M. Sensenich: Record of Mag.'s Proceedings showing Initial Appearance of 4/23/81; Deft. not to depart continential U.S.; Bail Reform Act #2; $25,000.00 OR bond.
4/28/81	Entry of Appearance filed by Fred Mercer, Esq.
4/30/81	Consent Motion for Extension of Time within which to File Pretrial Motions filed by deft. with proposed order thereon.

Appendix G

5/1/81	Order entered directing that deft. have until 5/25/81 to file pre-trial motions. (Cohill, J).
5/18/81	Order entered directing that the last date upon which the trial of this case may commence is extended for 73 days from July 2, 1981 to Sept. 15, 1981. (Cohill, J.) (Exhibit A attached).
9/21/81	Jury selection. 10:45 a.m. to 1:45 p.m. before Judge Cohill.
9/21/81	Jury trial begin and continues before Judge Cohill and a jury. (Deft's oral motion for sequestration of witness — granted) (Govt oral motion for sequestration of witnesses — GRANTED) (Govt's oral motion not to sequester Special Agent — GRANTED but question reserved as to whether testimony will be relevant).
9/22/81	Jury trial continues.
9/23/81	Jury trial continues. (Deft's motion to receive immunity materials on John Harmon prior to his testimony — GRANTED).
9/24/81	Application by USA for immunity of John J. Harmon and order entered GRANTING same. (Cohill, J.).
9/24/81	Jury trial continues.
9/25/81	Application by USA for immunity of Thomas F. Huff and order entered granting same. (Cohill, J.). Signed 9/24.

Appendix G

9/25/81	Application by USA for immunity of Shirley G. Huff and order entered granting same. (Cohill, J.). Signed 9/24.
9/28/81	Jury trial continues.
9/29/81	Jury trial continues.
9/29/81	Order entered re: Immunity of Kenneth C. Harmon, filed. (Cohill, J.).
9/30/81	Jury trial continues.
10/1/81	Jury trial continues.
10/2/81	Jury trial continues and concludes before Judge Cohill, memo filed. (Rep. Colvin Vogel) (Deft's motion for directed verdict — DENIED).
10/5/81	Order entered re: jury accommodations. (Cohill, J.).
10/5/81	Verdict returned by jury on 10/2/81 finding deft. GUILTY on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, filed.
10/5/81	Notice setting sentence for 11/6/81 at 9:00 a.m. before Judge Cohill, filed.
10/9/81	Motion for a judgment of acquittal or, in the alternative, for a new trial filed by deft. with two proposed orders attached.

Appendix G

10/9/81	Application for extension of time within which to file post-trial motions filed by deft. with proposed order.
10/9/81	Order entered directing that time for filing post-trial motions is extended to 10/26/81; Briefs in support of such motions due 11/6/81; and Arguments on such motions set for 11/6/81 at 9:00 a.m. Further ordered that the request for filing such motions be extended to 14 days after the filing of the transcript is DENIED. (Cohill, J.).
10/23/81	Petition to amend docket and enter order reflecting grant of continuance in interests of justice, filed by US Atty. with proposed order thereon.
10/26/81	Order entered directing that from 9/8/81 until 9/21/81 on consent of both parties; that period of time was excludable delay under the Speedy Trial Act under the nature of a continuance. (Cohill, J.).
11/6/81	Hearing on Post-Trial Motions held before Judge Cohill, memo filed. (Rep. C. Vogel) (Deft. Motion for Judgment of Acquittal and Motion for New Trial — BOTH DENIED) (Bond continued pending appeal).
11/6/81	SENTENCE: Count 1: 2 years imprisonment and $1,000.00 fine, no costs. Counts 2-16: 2 years imprisonment on each count. Execution of

sentence as to imprisonment only is suspended and the deft. is placed on 2 years probation on each count to run concurrently with each other and consecutive with Count 1, and a fine of $1,000.00 on each count. It is the intention of the Court that the deft. be sentenced to 2 years imprisonment; be fined a total of $16,000.00 and placed on 2 year probation after imprisonment. No costs. (Cohill, J.).

11/6/81 Pursuant to sentence of 11/6/81 before Judge Cohill, judgment is hereby entered against the deft. in the amount of a $16,000.00 fine. Gilbert W. Conley, Clerk.

11/16/81 NOTICE OF APPEAL filed by deft. appealing sentence entered 11/6/81. Letters.

11/19/81 Order entered 11/18/81 directing original record and exhibits be maintained for use by Court Reporter Colvin Vogel and forwarded to the Circuit when transcript is complete. (Cohill, J.).

11/19/81 CC of order of 11/18/81 and letter forwarded Ct. of Appeals.

12/28/81 CC of order dated 12/23/81 setting briefing schedule rec'd from the Ct. of Appeals and filed with letter advising case docketed at No. 81-3105.

3/15/82 Transcript of jury trial held 9/21/81 before Judge Cohill filed. (Rep. C. Vogel) (Vol. I).

Appendix G

3/15/82	Transcript of jury trial held 9/21/81 before Judge Cohill filed. (Rep. C. Vogel) (Vol. II).
3/15/82	Transcript of jury trial held 9/21/81 before Judge Cohill filed. (Rep. C. Vogel) (Vol. III).
3/16/82	ORIGINAL RECORD & EXHIBITS COMPLETE FOR PURPOSES OF APPEAL. CC of docket entries mailed U.S. Ct. of Appeal.

Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1086

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAVID H. GROOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for willfully aiding and assisting in, and procuring, counselling, and advising the preparation of false income tax returns, asserting that the evidence was insufficient to establish that he acted willfully and that his trial attorney's representation was ineffective.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on 16 counts of willfully aiding and assisting in, and procuring, counselling and advising the preparation of false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(2) (Pet. 4). The court sentenced him to two years' imprisonment, fined him $16,000, and imposed two-years' probation following his imprisonment (Pet. App. 38a-39a). The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial showed that between 1975 and 1978 petitioner, a certified public accountant and professor of accounting (Pet. 4), prepared federal income tax returns for a family coal mining business, known first as Harmon Coal Company and later as Harmon Mining Company, and for each of its partners, John and Kenneth Harmon and their wives (Pet. 13; C.A. App. 5-17). Between 1975 and 1977, petitioner also prepared joint federal income tax returns for Thomas and Shirley Huff, who were in the coal mining business (Pet. 13; C.A. App. 18-20). Petitioner reported income on these returns in accordance with a scheme he devised under which reporting of the coal companies' income was deferred (Pet. 4-5, 13). Under this scheme, the coal companies had some of their customers pay for coal purchases with checks payable to B&G Coal Company, a purported coal brokerage firm set up by petitioner (Tr. 416-418, 684-690). The coal companies sent these checks to B&G Coal without recording the receipts on their books (Tr. 417-422, 686-690), and petitioner deposited the money into separate B&G bank accounts maintained for them (Tr. 424-425, 684). Together with petitioner, John and Kenneth Harmon and the Huffs had signature authority over their respective B&G bank accounts (Tr. 424-425, 685, 868). Under the arrangements with his clients, petitioner would return money to the coal companies when they needed or wanted it (Tr. 420, 432-433, 688). The receipt of the money would be recorded on the books of the coal companies as income at that time (Tr. 417-422, 686-690). Thus, income would be reported for the year in which money was returned to a coal company rather than the year in which payment for coal was originally received (Pet. 13). As a result of this scheme, the Harmons and their partnership underreported their incomes for 1974 through 1977, and the Huffs underreported their income for 1974 and overreported their incomes for 1975 and 1976 (Pet. 13-14; C.A. App. 5-20).

1. Petitioner challenges (Pet. 10-17) the sufficiency of the evidence to support his conviction. He contends that the evidence does not support a finding that he acted willfully, since there was doubt whether the taxpayers were required to report the coal sale proceeds received by B&G Coal Company in the years of receipt. But this claim of evidentiary insufficiency was fully reviewed and rejected by the court of appeals (Pet. App. 1a), and petitioner has not advanced any reason why this Court should now consider this fact-bound issue.

At all events, there was abundant evidence from which a jury could reasonably find that petitioner acted willfully, *i.e.*, that he voluntarily and intentionally violated a known legal duty. *United States* v. *Pomponio*, 429 U.S. 10 (1976). The evidence showed that petitioner knew the principles of tax law involved in this case. He was a certified public accountant and a professor of accounting (see *United States* v. *Rischard*, 471 F.2d 105, 108-109 (8th Cir. 1973)) and, according to his secretary's testimony (Tr. 329-330), did extensive tax law research in connection with his scheme for deferring the receipt of income for income tax purposes.

The diversions of income under the scheme were obvious shams. Petitioner's clients, not B&G Coal, made coal sales, earned the income from the sales, and actually received the payments for coal (Tr. 419, 440-442, 683-684, 688, 691-692). The payments transferred to B&G Coal by the clients were required to be returned to the clients on demand (Tr. 420, 688) and were deposited to bank accounts over which the clients had signature authority (Tr. 424-425, 685, 868). Thus, there was no basis for a good faith belief that, for tax

purposes, petitioner's clients did not receive the income diverted to and held for them by B&G Coal.[1]

During an Internal Revenue Service investigation of petitioner, he falsely told an IRS agent that the money that went into B&G Coal represented fees for his own brokerage services (Tr. 1045-1048). Both John Harmon and Thomas Huff testified that they never paid petitioner any brokerage fees for coal transactions (Tr. 440-442, 691-692). Petitioner's false exculpatory statement was evidence from which the jury could have concluded that petitioner was aware that the scheme was a complete sham and therefore find that he had willfully assisted in the filing of false returns. *United States* v. *Walsh*, 627 F.2d 88, 92 (7th Cir. 1980); *United States* v. *Allen*, 522 F.2d 1229, 1232 (6th Cir. 1975), cert. denied, 423 U.S. 1072 (1976); *United States* v. *Rischard, supra*, 471 F.2d at 108-109.

Finally, petitioner diverted large sums of money from B&G Coal for his own purposes (Tr. 1081-1084). Thus, the jury could infer that petitioner's advice to his clients was not rendered in good faith, but was part of a scheme to gain access to the clients' money for his own purposes.[2]

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[1]Even without signature authority over their B&G accounts and the right to demand the immediate return of funds to themselves, under well-settled tax law, petitioner's clients would have been required to report diverted payments as income. A taxpayer who arranges for the proceeds of a transaction of his own to be paid to another party is deemed to have received the income himself. *Helvering* v. *Horst*, 311 U.S. 112 (1940); *Lucas* v. *Earl*, 281 U.S. 111 (1930).

[2]Petitioner asserts (Pet. 6-7, 16-17) that there was insufficient evidence to establish as a matter of law that he acted willfully because an agent of the Internal Revenue Service admitted at trial that there "might well be" a difference of opinion between people of equal expertise as to when the payments became income to petitioner's clients. But a reading of the agent's testimony (Tr. 1002-1007) reveals that the agent merely said that there was a possibility that there could be a disagreement as to when the payments should be recognized as income to petitioner's

2. Petitioner further contends (Pet. 18-20) that he was prevented from testifying in his own behalf because his defense counsel at trial threatened to withdraw if he took the stand. He also urges (Pet. 21-22) that his trial attorney's performance (not the attorney representing him before this Court) was ineffective because no defense testimony or evidence was offered at trial despite the alleged facts that petitioner insisted on testifying, an expert accounting witness was available to endorse petitioner's tax deferral plan, and numerous character witnesses were available. But petitioner did not present these claims to the district court; rather, he raised them for the first time in his petition for rehearing filed with the court of appeals (Pet. 9-10). Thus, since the record contains no facts upon which to evaluate petitioner's claims, there is no basis for review of them by this Court.[3] *United States ex rel. McCann* v. *Adams*, 320 U.S. 220, 221 (1943); *Waley* v. *Johnston*, 316 U.S. 101, 104 (1942). Petitioner's claim must be raised by way of a motion under 28 U.S.C. (& Supp. V) 2255. See, e.g., *United States* v. *Holy Bear*, 624 F.2d 853, 856 (8th Cir. 1980); *United States* v. *Brown*, 591 F.2d 307, 310 (5th Cir.), cert. denied, 442 U.S. 913 (1979); *United States* v. *Carlson*, 561 F.2d 105, 109 (1st Cir.), cert. denied, 434 U.S. 973 (1977).

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clients, not that there was any real doubt upon this issue. At all events, the jury heard the agent's testimony and the evidence bearing upon petitioner's intent, and it obviously concluded that petitioner was aware that his scheme was improper.

[3]Petitioner relies on an affidavit of his wife to support his claim that his counsel's alleged threat to withdraw presented him with a "Hobson's choice" of foregoing his right to counsel or his right to testify (Pet. 8, 18-20; Pet. App. 10a-11a). But Mrs. Groom's affidavit negates this claim. She states (Pet. App. 11a) that defense counsel advised petitioner that in the event of counsel's withdrawal, petitioner "could always get another attorney * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02